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SHERONDA DANIELS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF L V DANIELS, JR DECEASED; L V DANIELS, SR, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF L V DANIELS JR DECEASED; LILLIE RUE DANIELS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF L V DANIELS JR DECEASED, PETITIONERS

v.

CITY OF DALLAS; KENT OWEN WOLVERTON, CITY OF DALLAS OFFICER INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The United States Supreme Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), held that in a high speed chase where little time is available for reflection, the proper standard for officer liability under 42 U.S.C. § 1983 is "intent to harm." *Lewis*, 523 U.S. at 836. But *Lewis* left open the question of what standard would apply in a non--emergency situation. *See Lewis*, 523 U.S. at 863 ("We have expressly left open whether . . . .something less than intentional conduct, such as recklessness or 'gross negligence,' can ever constitute a 'deprivation' under the Due Process Clause.")(Scalia, J.). The question in this case is should there be a middle level of culpability when there is time for deliberation and when the police are not faced with a split--second decision but with the benefit of time choose to act grossly negligent, recklessly or with deliberate indifference?

2. Is a municipality liable when an officer breaches this standard in a non--emergency, non--chase situation?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Sheronda Daniels, L.V. Daniels, Sr., and Lillie Rue Daniels, each individually and on behalf o of the estate of L.V. Daniels, Jr., deceased, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit (the "Court of Appeals").

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra at 1a – 5a) is unpublished at Daniels v. City of Dallas, 2008 U.S. App. LEXIS 6619 (5th Cir. 2008). The order that is the subject of this petition dismissed all of Plaintiff's federal claims including causes of action under 42 U.S.C. §1983.

JURISDICTION

The Court of Appeals' decision was entered on March 28, 2008. (App., infra at 1a – 5a). The Petitioners timely filed a petition for en banc consideration and for panel rehearing on April 11, 2008. The Court of Appeals denied the Daniels' petition for en banc consideration and for panel rehearing on May 14, 2008. (App., infra at 33a). This Court's jurisdiction in invoked under 28 U.S.C. sec. 1254(1).

RELEVANT PROVISIONS INVOLVED

U.S. Constitution, 14th Amend. Sec. 1.:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This case concerns the equally tragic and unnecessary killing of innocent pedestrian L.V. Daniels,

Jr. by Officer Kent Owen Wolverton. On September 23, 2005, Officer Wolverton responded to a non-emergency Code 1[1] police dispatch call to back-up an Officer Castro. It was within Officer Wolverton's discretion to take the call to provide additional back-up to Officer Castro. After deliberation, Officer Wolverton decided to accept the call and back-up Officer Castro.

Two other officers were already en route when Officer Wolverton decided to respond. According to forensic evidence from the squad car's GPS and black box systems, Officer Wolverton proceeded to the non-emergency call through residential neighborhoods, at night, without lights and sirens at speeds in excess of 70 mph (more than double the posted speed limit of 30 mph).

Officers Thompson and Dilbeck were also in Wolverton's area. (R.Vol. 2, 260). But in their discretion, they chose not to respond to Officer Castro's non-emergency request for back-up. Officer Castro's request for back-up was a Code 1 non-emergency request. Officer Wolverton knew this was a Code 1 non-emergency request.

A Code 1 non-emergency request call requires, under the City's written policy, for the officer to respond with no emergency lights and sirens and in compliance with all traffic laws. This is accepted and appropriate police procedure according to Lou Reiter, the Plaintiffs' expert on police procedure (which was not disputed). While Officer Wolverton (or any other officer

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[1] Code 1 is a City of Dallas police code for a routine non-emergency call.

involved) could have, in his discretion, converted this non-emergency Code 1 call to an emergency Code 3 call via radio, neither Wolverton, nor the other responding officers, nor the officer requesting assistance chose to do so. In hindsight, Officer Wolverton claimed that he heard yelling in the background during Officer Castro's request for Code 1 assistance. Officer Wolverton did not request further clarification from dispatch or from the officer requesting assistance. Officer Wolverton did not use his emergency lights or sirens, despite his decision to use high speed in a residential neighborhood. The affidavits of five other disinterested witnesses indicated that two other police cars before Wolverton's drove by on Dixon Avenue with their emergency lights on.

Officer Wolverton unilaterally chose to ignore the police dispatcher (and ignored Officer Castro who only requested Code 1 assistance), and chose to proceed faster than a Code 1 response allowed. Officer Wolverton intentionally ignored all traffic laws and sped to the scene, through lights and stop signs, at speeds of 57 to 70 miles per hour. All of this took place at night and in a residential neighborhood.

While proceeding through a residential intersection with a posted speed limit of 30 miles per hour, Officer Wolverton encountered a car stopped in the middle of the intersection to allow L.V. Daniels, Jr., to walk across the intersection of Dixon and Bourquin Street. Wolverton was forced to pass the stopped car on the right, despite the fact that there was no lane, because he was going too fast to avoid the stopped car. Officer Wolverton passed this car on the right at a high rate of speed (at least 57 miles per hour). Tragically,

L.V. Daniels, Jr. was crossing the street at the time. The evidence from eye witnesses is that Daniels had almost completed his crossing of the street and was about to step on the curb. Before he could make it, L.V. Daniels, Jr. was struck and killed by Officer Wolverton. Eye witnesses testified that Daniels did nothing wrong. Eye witnesses also testified that no one in Daniels' position would have been able to avoid death because of the rate of speed at which Wolverton was traveling at the time of impact. Eye witnesses also believe that even if Wolverton had seen Daniels, it would have been impossible for Wolverton to avoid hitting Daniels at the rate of speed Wolverton was traveling.

Officer Wolverton was so deliberately indifferent to any citizen who had the misfortune of being on Dixon Avenue at the time that Officer Wolverton did not even realize he had killed the Dallas citizen he had sworn to protect. Instead, Officer Wolverton believed that someone on the street had thrown a large rock or brick at his windshield. He stopped his car and leapt from it, armed and ready to do battle, until he realized it was not a rock or brick but rather a human being that lay broken in the night street.

After Officer Wolverton killed L.V. Daniels, Jr., there was a brief internal affairs investigation conducted by Kimberly Owens. Kimberly Owens had worked with Wolverton at the same substation when Wolverton was a new recruit. No disciplinary action whatsoever was taken against Officer Wolverton for killing L.V. Daniels, Jr. – save, that is, the routine, paid administrative leave while a semblance of an investigation took place. Indeed, no change whatsoever took place within the Dallas Police Department other

than the harassment of the citizens of the Dixon Avenue area for a few weeks after L.V. Daniels, Jr.'s killing by issuing jay-walking tickets to pedestrians crossing the street where Mr. Daniels was killed. This intersection divides a bus stop from a convenience store.

Plaintiffs' expert on police procedure, Lou Reiter, analyzed the City's internal investigation and testified that the investigation was done:

> in a biased manner in an attempt to shield Officer Wolverton and the Department from liability or culpability. The Department's administrative review was a sham totally designed to attempt to insulate it and Officer Wolverton from accountability.

This expert opinion was not disputed in the lower court. It was also not mentioned in the lower court's ruling.

Officer Wolverton testified that he was trained by the City of Dallas to ignore the written policy that purported to govern the proper procedure to respond to calls. The City of Dallas' unwritten policy, as attested by Wolverton, left all discretion on the use of a police vehicle, the decision to operate at high speeds, the decision to use or not use emergency lights and sirens, up to the sole discretion of each police officer. Lou Reiter's undisputed expert testimony established that this type of training violates accepted norms of police procedure.

Lou Reiter is the only expert witness that opined on whether the situation presented an "emergency" to Officer Wolverton. Mr. Reiter concluded:

> This was not a split second decision making police task. This was a case to drive in a safe and prudent manner and not abuse the entrustment of an emergency vehicle. Any reasonable police officer would know that Officer Wolverton's driving was reckless and not done with due regard for the safety of the public.

REASONS FOR GRANTING THE PETITION

A. The Court in *Lewis* leaves open the question of what standard applies in non-emergency responses when officers have time to deliberate.

1.

At the heart of due process analysis has always been protection of the individual against arbitrary government action. *Lewis*, 523 U.S. 833 at 845.

> As to the words from the Magna Charter, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to the exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

Lewis, 523 U.S. 833 at 845, quoting with approval *Bank of Columbia v. Okely*, 17 U.S. 235 at 244, 4 Wheat. 235 at 235-244 (1819) (Johnson, J.).

While the pendulum has certainly swung to recognize the fact that police have a difficult job and must be given latitude when making split-second life and death decisions, we should recoil from a society where there is no culpability when police act with recklessness where there is no justification based in a true emergency. Furthermore, we must not allow police to, with a wink and a nod, excuse in hindsight their illegal behavior by claiming an emergency where none existed. Police certainly should be given the benefit of the doubt in emergency situations. But in non-emergency situations raising the standard of liability to a point that equates to blanket immunity unwinds the historical struggle of our founding fathers to protect the individual from arbitrary and abusive oppression of the powerful over the weak.

2.

Here the seminal case in deciding whether the lower court's granting of the Defendants' motions for summary judgment is erroneous is the United States Supreme Court decision in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). The Supreme Court in *Lewis* limited its holding to the specific facts of that case, and emphasized that its decision was founded on the threats posed to officers when criminals flee a scene and prompt a high-speed chase.

In *Lewis*, Deputy Smith and Deputy Stapp saw a motorcycle approaching at high speed. *Lewis*, 523 U.S. at 836. Willard was driving the motorcycle and Lewis was riding on the back. *Id.* Deputy Stapp turned on his overhead rotating lights and yelled to the boys to stop.

Deputy Stapp tried to position his vehicle with another squad car in a way that would pen in the motorcycle. *Id.* Willard maneuvered the motorcycle around the squad cars and took off. *Lewis*, 523 U.S. at 837. Deputy Smith switched on his own emergency lights and siren and began pursuit at high speed. *Id.* Willard wove in and out of traffic, forcing two cars and a bicycle off the road, and reached speeds of 100 miles per hour. *Id.* Willard lost control. Lewis fell off. Deputy Smith hit Lewis with his patrol car, skidding into him at 40 miles an hour. *Id.* Lewis died. *Id.* Lewis's parents sued the County of Sacramento and Deputy Smith alleging deprivation of Lewis's constitutional right to life under the Fourteenth Amendment and triggering their right to private redress found in 42 U.S.C. §1983. *Id.*

The lower court granted summary judgment for Deputy Smith, reasoning that even if he violated the Constitution, he was entitled to qualified immunity. *Lewis*, 523 U.S. at 837. The Court of Appeals for the Ninth Circuit reversed, holding that the "appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security." 98 F.3d 434, 441 (9th Cir. 1996). The Ninth Circuit remanded to the lower court for a factual finding of whether Deputy Smith's actions were "deliberately indifferent" to or in "reckless disregard" of Lewis's right to life.

The Supreme Court granted certiorari to resolve a conflict among the circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process **in a pursuit case**. *Lewis*, 523 U.S. at 839. A unanimous Supreme Court

disagreed with the standard that the Ninth Circuit applied because, "Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response." *Lewis*, at 855. Justice Souter, writing for the Supreme Court, noted language from *Graham v. Connor*, 490 U.S. 386 at 397, 109 S.Ct. 1865 at 1872, 104 L.Ed.2d 443 at 456 (1989), that was applicable to Deputy Smith's conduct: "Police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." Justice Souter held that Deputy Smith was not liable to Lewis because, in the context of a high-speed chase, only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience and necessary for a due process violation. *Lewis*, 523 U.S. at 836. There was no evidence that Deputy Smith intended to harm Lewis; his only intent was to arrest Willard and Lewis. So the Supreme Court held that Deputy Smith was not liable.

But Justice Souter went to considerable length to emphasize that recklessness, gross negligence and deliberate indifference were still valid standards that **would** trigger liability outside the context of a high-speed chase. *See Lewis*, 523 U.S. 849 – 854. In fact, J. Souter confirmed that "deliberate indifference" or some other mid-level standard (such as recklessness or gross negligence) **is** the proper standard of liability to employ when addressing a constitutional "dereliction as reflective of municipal policy and to sustain a claim of municipal liability for failure to train an employee who causes harm." *Lewis*, at 850 n.10. In *Lewis*, Justice Souter reviewed with approval the numerous circumstances in which "deliberate indifference" or

some other mid-level standard (such as recklessness or gross negligence) was sufficient to impose §1983 liability. Because J. Souter spent so much time confirming other instances in which a lower standard remains the proper standard, it is apparent that Justice Souter is applying the "intent to harm" standard as an **exception to the rule,** and only in the extraordinary case where there is no time for reflection. In fact, one can almost hear the regret in Justice Souter's tone when, after emphasizing that "rules of due process are not . . . subject to mechanical application," 523 U.S. at 850, and after noting many instances in which a mid-level standard would still be sufficient to impose §1983 liability, he is forced to concede that under the *Lewis* facts "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.'" *Lewis*, at 853, quoting *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 88 L.Ed. 2d 662 (1986).

While the Supreme Court was unanimous in applying the "intent to harm" standard to high-speed chases, it can equally be said that the Court was unanimous in its agreement that a lesser standard would apply in a different circumstance. Even Justice Scalia, while poking fun at the Court's use of the phrase "shocks the conscience in a constitutional sense" – a phrase Scalia claims is of little assistance, concedes that, We have expressly left open whether . . . something less than intentional conduct, such as recklessness or gross negligence can ever constitute a deprivation under the Due Process Clause. *Lewis*, 523 U.S. at 863, citations and quotes omitted, (Scalia, J. concurring).

So the question post-*Lewis* remains: What standard of liability applies when a police officer deprives an innocent citizen of his right to life when responding to a non-emergency call where there is time to deliberate?

B. There is little consistency among the Circuit Courts of Appeals as to whether a lower standard exists and if so, what that standard is.

1.

The question remains unanswered regarding whether there is a lower standard when addressing substantive due process violations in situations when an officer is responding to a non-emergency call and has time to deliberate. As a result, Circuit Courts are in varying stages of disagreement, not only with other Circuits, but within the Court themselves, as to whether a lower standard exists and if so, what it is.

One need look no further than the Fifth Circuit holding in this case. Here, Officer Wolverton killed an innocent pedestrian while driving through a residential neighborhood at night, without lights or sirens, and at a high rate of speed while responding to a non-emergency call. The Fifth Circuit reasoned that this case involves "negligence" or "even gross negligence," but not "deliberate indifference" and therefore, no substantive violation exists. (App. *infra* A at p. 2) This reasoning is at odds with the holding in *Lewis* wherein this Court recognized that liability may attach in non-emergency situations where the officer is acting with "deliberate indifference," "recklessness" or "gross negligence."

2.

Another case that demonstrates the need for guidance from the United States Supreme Court is the bitterly divided Eighth Circuit opinion in *Terrell v. Larson*, 396 F. 3d 975 (8th Cir. 2005). In *Terrell*, officers responded to a domestic disturbance call with emergency lights and siren activated. The deputies drove through a red light and collided with a car in the intersection. An occupant of the car was killed. Appellees, heirs and next of kin, alleged that the deputies' reckless driving violated the occupant's right to substantive due process. The district court found that summary judgment was improper because whether the deputies were responding to an emergency was a disputed issue of fact that would determine whether deliberate indifference or intent to harm was the applicable standard of fault. The en banc court decided 10-3 that *Lewis* required an "intent to harm" standard when police were involved. The strong dissent began,

> Today's decision has the effect of giving police officers *unqualified* immunity when they demonstrate deliberate indifference to the safety of the general public. A police officer may now kill innocent bystanders through criminally reckless driving that blatantly violates state law, police department regulations, accepted professional standards of police conduct, and the community's traditional ideas of fair play and decency so long as the officer subjectively, though unreasonably, believed an emergency existed. The majority's holding extends Lewis's high-speed pursuit rule from its intended purpose of protecting officers forced to make

> split-second decision in the field to a per se rule that now shields officers even after they have had an actual opportunity to deliberate at the police station. Believing that 42 U.S.C. gives citizens a remedy for egregious abuses of executive power that deprive citizens of their constitutional right to life, we dissent.

Terrell, 396 F.3d 975 at 981(dissent).

Such cautionary language should not be quickly dismissed.

The *Terrell* decision is inconsistent with the Supreme Court's decision in *Lewis*. Moreover, the strong dissent in *Terrell* and this case demonstrate that that Circuit Courts are unclear on whether intent to harm is the standard across the board in police response cases or whether a lower standard is applicable when an officer has time to deliberate before acting.

C. This case presents a perfect opportunity for the United States Supreme Court to determine, post-*Lewis*, what standard applies in non-emergency response situations where the officer has time to deliberate.

1.

The United States Supreme Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), held that in a high speed chase where little time is available for reflection, the proper standard for officer liability under 42 U.S.C. § 1983 is

"intent to harm." *Lewis*, 523 U.S. at 836. But *Lewis* left open the question of what standard would apply in a non-emergency situation. *See Lewis*, 523 U.S. at 863 ("We have expressly left open whether . . . .something less than intentional conduct, such as recklessness or 'gross negligence,' can ever constitute a 'deprivation' under the Due Process Clause.")(Scalia, J.). The Supreme Court strongly hinted that in a non-emergency, non-chase situation the applicable standard for liability would fall in the "mid-level" range. *Lewis*, 523 U.S. at 849-851. The proper standard for deciding whether police action is so arbitrary as to be constitutionally shocking when police officers are met with a routine decision that does not require split-second decision making is "*deliberate indifference*," "*recklessness*" or "*gross negligence*." *See Id.*

Here, Officer Wolverton killed an innocent pedestrian while recklessly driving through a residential neighborhood at night without lights or sirens, and at a high rate of speed while responding to a non-emergency call. Without a doubt, this conduct is at least reckless or grossly negligent as contemplated by this Court in *Lewis*. Lou Reiter, the Plaintiffs' expert on police procedure, concluded:

> Officer Wolverton violated this entrustment and used his police vehicle in a way known to endanger the public without justification or obvious concern. Any reasonable police officer would have known that operating a police vehicle in violation of the law, without reasonable use of emergency equipment to give warning to the public, and contrary to generally accepted police practices would needlessly and recklessly place

members of the pubic in harm's way and expose them to the potential of death. (R.Vol. 3, 603; Rec. Excerpts Tab 8).

Officer Wolverton claims that he proceeded as if an emergency existed because of what he heard in the background of Officer Castro's call. The Daniels believe this was a concocted story created in hindsight to protect Officer Wolverton. There is ample evidence to support the Daniels' belief. Officer Wolverton testified that anyone listening to the call could have escalated the call from a Code 1 to a Code 3. (R.Vol. 2, 325). This means that he could have escalated the call, "Stan" the dispatcher could have escalated the call[2], Officer Castro could have escalated the call, the two officers that responded before Wolverton (and presumably arrived at the scene) could have escalated the call, and any other officer listening (including the two patrol cars patrolling the parking lot with Wolverton who simply decided not to respond) could have escalated the call to a Code 3. No one did. If there was such commotion in the background why didn't Wolverton escalate the call to a

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[2] "Stan" was the dispatcher who issued the Code 1 call on the evening Wolverton killed Daniels. Wolverton's testimony concerning Stan is strong evidence that Wolverton's claim that he thought Officer Castro was in trouble is not credible. Wolveton testified: "Stan is our best dispatcher. I mean he's—he's always know what's going on. He knows where officers are at. And if you—if you are in a situation where you do need a Code 3 response, he doesn't hesitate to give you a Code 3 response." Given Wolverton's trust that Stan knows what is going on and will not hesitate to escalate a call, why did Wolverton believe that the Code 1 call was an emergency? Wolverton's praise of Stan is a strong admission that if Castro was experiencing a true emergency Stan would have called for a Code 3. He did not. The reality is that there was no emergency.

Code 3? Why didn't any of the other officers or dispatchers escalate the call? Wolverton's story is not only self-serving, it makes no sense in light of the evidence.

Furthermore, Wolverton admits that he did not turn on his sirens and did not turn on his emergency, rotating lights. (R.Vol. 2, 355). Wolverton's story completely falls apart upon this admission. If Wolverton truly believed there was an emergency and a Code 3 response was required he would have turned on his sirens and lights.

2.

There is historical agreement that arbitrariness in government action cannot be allowed to deprive the individual of constitutional rights. There is equal agreement that not every egregious act of government rises to a level of constitutional violation. *See Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed. 2d. 261 (1992)("Only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"). Courts often begin their analysis with the unarguable point that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976). The case law does not impose liability when a government official is merely negligent. As such, if Wolverton were obeying all other traffic laws and simply did not see Mr. Daniels in the street, no liability under 42 U.S.C. § 1983 would attach.

But courts have struggled to formulate a word phrase or test that captures the requirement that something more than negligence is required before the deprivation is constitutional. Beginning with *Rochin v. California*, 342 U.S. 165, 172-173, 96 L.Ed. 183, 72 S.Ct. 205 (1952) the Supreme Court has sometimes (but not always) incorporated the phrase "shocks the conscience."

Justice Souter in *Lewis* acknowledges that Justice Scalia has criticized the use of the phrase. *Lewis*, 523 U.S. at 847 n.8. Justice Scalia cannot resist the opportunity to write separately and remind the court of the subjectivity of: "th' ol' 'shocks-the-conscience' test." *Lewis*, 523 U.S. at 861(Scalia, J., concurring). Justice Scalia reminds the Court that the "shocks-the-conscience" analysis was previously discarded in *Washington v. Glucksberg*, 521 U.S. 702, 138 L.Ed. 2d. 772, 117 S.Ct. 2258 (1997). In classic Scalia tradition, he then emphasizes his point that the "test" does not give much guidance to judges employed to interpret the law by informing the Court of his belief that the outcome of the case should not be based on "whether the conduct here at issue shocks my unelected conscience." *Lewis*, 523 U.S. at 862 (Scalia, J., concurring).

Perhaps in deference to Scalia, or perhaps in a realization that the word phrase really does not provide much guidance, the remainder of the Justices spend substantial energy in *Lewis* to relegating the "shocks-the-conscience test" to the back of the bus. Justice Souter dances with the phrase before sending it packing: "While the measure of what is conscience-shocking is no calibrated yard stick, it does, as Judge

Friendly put it, 'point the way.'" *Lewis*, 523 U.S. at 847(citations omitted). Justice Kennedy (joined by Justice O'Connor) is more direct. He kicks it to the curb: "The ['shocks the conscience'] phrase has the unfortunate connotation of a standard laden with subjective assessments. In that respect, it must be viewed with considerable skepticism." *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring).

Regardless, the phrase "shocks the conscience" should not be misunderstood to be a standard of liability. Instead, it is merely one of many phrases used to emphasize two irrefutable points: 1) government action **can** be so arbitrary and infringing on the individual that the constitution is implemented; and, 2) the government action of which the citizen complains **must** be more than negligence.

In this instance, Officer Wolverton's decision -- to respond to a Code 1 non-emergency call at night with no lights and sirens at speeds exceeding twice the speed limit in a residential neighborhood and through an intersection heavily traveled by pedestrians -- shocks the conscience, both literally and in the constitutional sense.

3.

Post-*Lewis* it is settled that in high-speed chases the standard is "intent to harm." What this Court is left to decide is what standard applies in the non-emergency, non-chase, Code 1 situation, like the one that faced Officer Wolverton on the night he killed Mr. Daniels. Should there be a middle level of liability when there is time for deliberation?

This is what Justice Scalia noted was left open by *Lewis*. Justice Souter discussed this mid-level scrutiny at length:

> Whether the point of the conscience-shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but less than intentional conduct, such as recklessness or gross negligence, is a matter for closer calls.

Lewis, 523 at 849, citations and quotes omitted.

While not directly deciding, because the facts did not allow, Justice Souter strongly indicates that a mid-level standard is not only alive and well, but also that the "intent to harm" standard is the unusual exception reserved only when no deliberation is possible. Justice Souter gives examples of two instances where "deliberate indifference" was the standard, and still is the standard, for §1983 liability. The first involved rights of a pretrial detainee, and the second involved the standard of culpability in allegations that a municipality has failed in its training or hiring (the very issue presented herein at issue two). Justice Souter drives home the point that different cases can trigger different thresholds by quoting from *Betts v. Brady*, 316, U.S. 455, 462, 86 L.Ed. 1595, 62 S.Ct. 1252 (1942):

> The phrase [due process of law] formulates a concept less rigged and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be

> tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Given Justice Souter's strong endorsement of a mid-level standard such as gross negligence, recklessness or deliberate indifference, it is clear that these lower standards of culpability would be available to the Court in the right case. The question becomes what triggers the lower level standard? Justice Souter succinctly answers: "As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical." *Lewis*, 523 U.S. at 851. Put another way, the standard of liability under 42 U.S.C. §1983 is gross negligence, recklessness or deliberate indifference, **unless** the government actor must make a split-second decision where there is no time to deliberate. In that case, the standard is "intent to harm."

4.

This Court's decision in *Lewis* and other cases decided by other courts both before and after *Lewis* also demand that the standard of liability in a non-emergency police case is gross negligence, recklessness or deliberate indifference.

In fact, before *Lewis* the Fifth Circuit standard of liability for police conduct was recklessness, deliberate indifference or gross negligence. In *Grandstaff v. City of Borger, Texas*, 767 F.2d 161 (5th Cir. 1985), the City of

Borger police mistook an innocent man for a fugitive and killed him in a reckless attempt to capture what they believed to be a fugitive. Loved ones of the decedent sued the officers and the City of Borger. After a jury trial, a judgment was entered against the city and others for civil rights violations under §1983 for conduct that was reckless, deliberately indifferent and grossly negligent.

After *Lewis*, the Fifth Circuit reached the same result, albeit not in a police context. In *Kinzie v. Dallas County Hospital District*, 106 Fed. Appx. 192 (5th Cir. 2003)(unpublished), the appellant contracted HIV from a blood transfusion. The appellant argued that a federal regulation related to blood screening gave him enforceable constitutional rights under 42 U.S.C. §1983. The Fifth Circuit upheld the dismissal of his claim because the regulation was not in effect when the blood was screened. However, in analyzing the case the Fifth Circuit expressly recognized that under *Lewis* the case was a "mid-culpability" case. The Fifth Circuit went on to define the standard of liability for a mid level case:

> Kinzie's reliance on *Lewis*, a mid-level culpability case, is misplaced. For Kinzie's reliance on *Lewis* to prevail his allegations must establish that Parkland had mid-level fault, i.e., had been reckless or grossly negligent. As has already been discussed, Kinzie's complaint established only negligence, not gross negligence. 106 Fed.Appx. 192 (5th Cir. 2003)(unpublished).

The Fifth Circuit recognizes mid-level culpability. As discussed previously the Eighth Circuit in *Terrell* utilizes an "intent to harm" standard. It is

clear there is a split in the circuits, which must be resolved.

5.

There is no policy reason to treat police differently than other government actors as long as they are not in the heat of battle. History cautions against the unbridled discretion of police power. And make no mistake -- devising standards that allow the death of the innocent through reckless acts as egregious as Wolverton's, to be overlooked without incurring culpability will, in the long run, be of no benefit to the officers who perform their difficult work in good faith and by the book.

This Court should evaluate *Lewis* in light of the fact that the Supreme Court was offering an exception to the rule. "Intent to harm" is the standard **only** when an officer faces the most emergent of circumstances in which a split-second divides life from death. To extend such a high standard to instances where, as here, the "emergency" is non-existent, or in other cases where the "emergency" is distant and tangential, is more than a misreading of *Lewis*. It is an about-face from this Court's precedent and a dangerous step towards destroying the protections our founding fathers established to protect the individual from the arbitrary use of government power.

The lower court erred in dismissing petitioners' claims. This case gives the Court an opportunity to decide whether a lower standard applies in a non-emergency situation where an officer has time to deliberate, and if so, what that standard is.

D. The City of Dallas is liable for the death of L.V. Daniels.

1.

The lower courts also erred with respect to the Plaintiffs' claims against the City of Dallas. Qualified immunity only protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396, 409 (1982). A municipality incurs liability under 42 U.S.C. §1983 for its employees' acts when a municipal policy involving hiring or training causes those unlawful acts. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412, 424 (1989).

The undisputed evidence from the testimony of Officer Wolverton and expert witness Lou Reiter was that Officer Wolverton's training in the field taught him to respond in whatever manner he chose, and not to respond as he was previously taught from the official manual of the police academy. This mentality is not only condoned by the City, but also taught by the City and led to Officer Wolverton's deliberate indifference to L.V. Daniels, Jr.'s life and beyond reckless response to a Code 1 non-emergency call.

The law is clear that a municipality may incur 42 U.S.C. § 1983 liability for its employees' unconstitutional acts when a municipal policy concerning training causes those acts. *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed. 2d

412 (1989); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978) ; *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir. 1992); *Bittakis v. City of El Paso*, No. 05-CA-0402, 2007 U.S. Dist. LEXIS 29793, 2007 WL 949521 (W.D. Tex. March 13, 2007). The City of Dallas is liable, and the lower court erred in granting the City of Dallas's motion for summary judgment.

2.

The lower court ignored that Plaintiffs alleged acts of constitutional deprivation against the City, wholly separate from Officer Wolverton's conduct, which violated the constitutional rights of Daniels. The Daniels alleged that the City had two policies for police response, a written policy that conformed to accepted police practice, and an unwritten policy in which officers are trained to ignore the written policy and respond in any manner they see fit. This is independent, outrageous, and arbitrary government action that not only shocks the conscience, meets and exceeds the standard of deliberate indifference, but also directly led to the death of an innocent citizen.

It was Wolverton himself that provided the most compelling evidence of the City of Dallas' unwritten policy. Wolverton testified that in the police academy he was taught to obey rules in responding and operating his police vehicle that were in compliance with the same written procedures that the City of Dallas has implemented and that comply with generally accepted police procedures. He also testified that when he graduated from the Academy and came to work for the City of Dallas he was told to ignore those rules and

respond in any manner he wished. Lou Reiter is the plaintiffs' expert on police procedure. Lou Reiter testified that it is accepted police procedure to respond to a Code 1 call by obeying all traffic laws. Wolverton testified that he was trained by the City of Dallas to respond to a Code 1 call in any manner he deemed appropriate. He was taught that it was in his discretion to operate or not operate emergency lights, operate or not operate sirens, and to travel at whatever speed he liked. The City of Dallas has two very different policies with respect to training its officers. The first policy is written. It is handed out and taught to the officers at the police academy. The written policy clearly sets forth the difference between Code 1 and Code 3 and the protocol for responding to such calls. The second policy is unwritten. It is the training the officers receive once they leave the academy. It is this training where the officers are instructed to ignore the written policy and respond to all calls in whatever manner they feel like. It is Officer Wolverton's following of this unwritten policy that directly caused the death of L.V. Daniels, Jr.

3.

The law is clear that, "A municipality may incur section 1983 liability for its employees' acts when a municipal policy of hiring or training causes those acts." *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978) ; *Bittakis v. City of El Paso*, No. 05-CA-0402, 2007 U.S. Dist. LEXIS 29793, 2007 WL 949521 (W.D. Tex. March 13, 2007).

To establish a cause of action under §1983 for a hiring or training deficiency, a plaintiff must show: (1) the training or hiring procedures of the municipality's policymaker were inadequate; (2) the municipality's policymaker was deliberately indifferent in adopting the hiring or training policy; and (3) the inadequate hiring or training policy directly caused the plaintiff's injury. *See City of Canton,* 489 U.S. at 385-387; *Benavides,* 955 F.2d at 972. Justice Souter confirmed that "deliberate indifference" was still the proper standard for holding a municipality liable in *Lewis. Lewis,* 523 U.S. at 850 n.10.

Looking at the facts in the light most favorable to Appellants, the testimony of Officer Wolverton confirms the Plaintiffs' allegation that the City of Dallas trained him to ignore the written policy for responding to emergency and non-emergency calls. Expert witness Lou Reiter testified that response policies that did not require an officer to respond to a Code 1 call by obeying all traffic laws would be below acceptable and customary police standards. When asked what the proper standard would be for various response procedures, Officer Wolverton tersely responded "that would be left to the officer's discretion" continually throughout his deposition. This undisputed evidence, ignored by the lower court, is sufficient to meet both elements #1 and #2 of *City of Canton.*

The undisputed manner in which Officer Wolverton responded to the Code 1 call in question, when compared to the accepted police procedures outlined by Lou Reiter, is strong evidence of the City's failure to properly train and its deliberate indifference to proper police procedure. Lou Reiter's conclusion that the internal investigation was a "sham" and a deliberate

cover up lends more evidence to the allegation that the City was deliberately indifferent to proper police procedure. The cover up also provides strong evidence to the allegation that two policies exist. Merely having an "unwritten" policy contrary to the written policy requires an ancillary procedure to cover up "violations" of the written policy when those violations, predictably, occur.

The City of Dallas's liability is made even clearer when the obvious question is posed: If Officer Wolverton decided that he should treat Officer Castro's non-emergency call as a Code 3 emergency call, why did Officer Wolverton not activate his lights and sirens as he is required to under the City's written policy related to Code 3 calls? The answer is simple: As Wolverton testified, the City of Dallas trains its officers to ignore the written policy. Officer Wolverton acted consistently with what he was taught after he left the Academy. He was taught to respond as recklessly as he wanted. This instruction by the City of Dallas was deliberately indifferent to the life of L.V. Daniels, Jr. and to the other citizens who lived in Mr. Daniels' neighborhood.

The last prong of *City of Canton* is causation and it is easily established here. The City taught Wolverton that he could respond however he liked. Officer Wolverton's training in the field taught him to respond in whatever manner he felt was proper, and not to respond properly and lawfully as he was taught from the official manual and his training at the police academy. This mentality, not only condoned by the City but also taught by the City, led to Officer Wolverton's deliberate indifference to L.V. Daniels, Jr.'s life and beyond reckless response to a Code 1 non-emergency

call. It was the City of Dallas's field "training" coupled with Officer Wolverton's execution of such "training" that killed Mr. Daniels. The causal prong is satisfied.

4.

The lower court also failed to recognize that the Fifth Circuit's opinion in *Grandstaff v. Borger*, 767 F.2d 161, (5th Cir.1985), is directly relevant to the City's liability. If it were not the policy of the City of Dallas that their officers may act with deliberate indifference and recklessness, the City would have changed its "unwritten" policy after Mr. Daniels was killed and reprimanded and/or fired the officers who engaged in such conduct. Lou Reiter notes that the investigation exonerated and covered up the numerous breaches of the City's "written" (but not followed) "policy." This failure to take administrative action is exactly what this Court found so compelling in *Grandstaff*. Like the City of Borger in *Grandstaff*, the City of Dallas did nothing -- no reprimands, no fines, no firings, no changes in policy -- no action whatsoever to prevent a future incident exactly like the tragedy that occurred to Mr. Daniels. The only thing the City of Dallas has concerned itself with, from the initial "internal investigation" until today, is an avoidance of liability in the face of overwhelming facts to the contrary. This Court should respond to the City of Dallas's stance the same way the Fifth Circuit to the City of Borger's stance in *Grandstaff* – a city that took the same approach following misconduct of its officers – and impose 42 U.S.C. §1983 liability against the municipality. There can be no policy justification for protecting a municipality against liability in a case in which there is undisputed testimony that the training from the city

violated proper police procedure and undisputed expert testimony that the resulting internal investigation was, in the words of Lou Reiter, a "sham."

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted on all questions presented.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 07-10883 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHERONDA DANIELS, Individually and on Behalf of the Estate of L V Daniels, Jr Deceased; L V DANIELS, SR, Individually and on Behalf of the Estate of LV Daniels Jr Deceased; LILLIE RUE DANIELS, Individually and on Behalf of the Estate of LV Daniels Jr Deceased,
Plaintiffs -Appellants

v.

CITY OF DALLAS; KENT OWEN WOLVERTON, City of Dallas Officer Individually and in his Official Capacity,
Defendants-Appellees

March 28, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

JUDGES: Before HIGGINBOTHAM, STEWART, and OWEN, Circuit Judges.

OPINION

PER CURIAM: *

This case involves the tragic death of L.V. Daniels, Jr. On September 23, 2005, Officer Castro of the Dallas police force made a call for back-up from a drug arrest, requesting "Code 1" non-emergency cover. Officer Wolverton responded, and as he was speeding through an intersection around 8:00 PM, he swerved around a stopped car and hit Daniels, a pedestrian. Daniels sustained fatal injuries, and his family sued under § 1983 for violation of the Fourteenth Amendment right to life.

The central dispute is whether the district court, in dismissing Plaintiffs' claims with prejudice and granting Defendants' summary judgment motion, used the proper standard for actions that "shock the conscience" and are a constitutional violation under County of Sacramento v. Lewis.[1] We need not cabin this case into the narrow distinctions among high-speed chases and other responses to emergencies and non-emergencies.

It matters not here whether we apply an intent-to-harm standard for chases or a lower standard of deliberate indifference; Wolverton's actions do not fall within the ambit of either. This is a case that, although tragic, involves negligence or even gross negligence but not deliberate indifference[2]; under a substantive due process inquiry, ordinary tort liability does not obtain. As the Seventh Circuit held under a deliberate indifference inquiry in Hill v. Shobe,[3]

The fact that a public official committed a common law tort with tragic results fails to rise to the level of a violation of substantive due process. . . . motor vehicle accidents caused by public officials or employees do not

rise to the threshold of a constitutional violation actionable under § 1983, absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it. It is insufficient to show that a public official acted in the face of a recognizable but generic risk to the public at large.[4]

In an unpublished opinion in Smith v. Walden, we similarly affirmed a deliberate indifference holding in the police context. The district court held that a police officer who was speeding without lights or a siren in response to a non-emergency call and killed an innocent passenger did not act with "the level of arbitrary or intentional conduct that shocks the conscience in the constitutional sense."[5]

We find no facts in the pleadings or the record, viewed in the light most favorable to Plaintiffs, showing that Wolverton acted with the recklessness required for deliberate indifference. n6 Nor do we find error in the district court's treatment of Plaintiffs' facts and pleadings. No matter how favorably a court treats the Plaintiffs' facts and pleadings, they do not demonstrate the requisite factors for deliberate indifference.

Finally, Plaintiffs assert that the district court erred in granting summary judgment for the City. Plaintiffs claim that the City could still be liable if Wolverton's actions did not violate Plaintiffs' constitutional rights and that the court erred in concluding ipso facto that without a constitutional violation by Wolverton, the City could not be liable. We are not persuaded. In City of Canton v, Harris, the Court asked "whether there was a direct causal link between a municipal policy or custom and the alleged constitutional deprivation."[7] In

Monell v. New York City Dept. of Social Services, the Court held that the original language of § 1983 "imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights."[8] While the officer here exceeded the posted speed limit, proceeding at a speed of approximately 60 miles per hour, perhaps 57 or 58 miles per hour, he did not act, as we have concluded, with a level of recklessness that was a breach of a constitutional duty. Any link between a city policy as to the speed at which an officer may respond to non-emergency calls and this accident cannot perforce constitute a constitutional violation.

AFFIRMED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (observing that "for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."). Although Plaintiffs argue that the Supreme Court has questioned the validity of the "shocks the conscience" test, the Court made clear in Lewis that it is the proper test for a constitutional challenge under § 1983. See id

[2]See, e.g., Hernandez ex rel. Hernandez v. Texas Dept. of Protective and Regulatory Services, 380 F.3d 872, 882 (5th Cir. 2004) (citing Conner v. Travis County, 209

F.3d 794, 796 (5th Cir. 2000)) [*4] ("To establish deliberate indifference, the plaintiff must demonstrate culpability beyond mere negligence or even gross negligence.").

[3]93 F.3d 418 (7th Cir. 1996). In Shobe, the officer who caused a fatal accident at an intersection was not responding to an emergency and failed to turn on his emergency lights, headlights, or sirens. Id. at 419.

[4]Id. at 421-22 (internal citations omitted).

[5]Smith v. Walden, Order, USDC No. 2:97-cv-204-J, affirmed in Smith v. Walden, 228 F.3d 408 (Table), 2000 WL 1056091, at *1 (5th Cir. July 17, 2000) (unpublished).

[6]Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); see also Hernandez, 380 F.3d at 882 (internal citations omitted) (recognizing that "deliberate indifference is determined by a subjective standard of recklessness" and that ""the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'").

[7]489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (emphasis added).

[8]436 U.S. 658, 692, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

Filed 07/18/2007
CIVIL ACTION NO. 3:05-CV-2460-B
UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

SHERONDA DANIELS, ET AL., Plaintiffs,
V.
THE CITY OF DALLAS, ET AL., Defendants.

MEMORANDUM ORDER

This case comes to the Court on Plaintiffs' objections to the Magistrate Judge's May 10, 2007 Findings and Recommendation regarding three motions for summary judgment filed by the Defendants in this civil rights action. The Magistrate Judge recommends that the Court: grant Defendant Kent Wolverton's motion for summary judgment on qualified and immunity; grant in part the City of Dallas's motion for summary judgment; and grant Wolverton's motion for summary judgment on Plaintiffs' official capacity claims. The Magistrate Judge also recommends that all federal claims lodged against the Defendants be dismissed with prejudice and that this Court should decline to exercise supplemental jurisdiction over Plaintiffs' state claims. Plaintiffs timely filed objections to the Magistrate Judge's recommendation. This Court will conduct a de novo review of those portions of the Magistrate judge's findings and recommendation to which Plaintiffs have filed objections. 28 U.S.C. § 636(b) (1); FED. R. Civ. P. 72(b).

I. Background

This case arises from a fatal collision between a police car and a pedestrian. The vehicle was driven by Kent Wolverton, an officer of the Dallas Police Department. On the evening of September 23, 2005, Wolverton was patrolling the area near Fair Park. (Def. Officer Wolverton's App. in Supp. Mot. Summ. J. ["Defs. App."] 64). Around 8:00 p.m. he heard a fellow officer, Officer Castro, radio for cover at the Larry Johnson Recreation Center. (Id.). According to Castro, Wolverton, and other Dallas officers, the recreation center is located in a high crime area often involving illegal drug and weapons activity. (Id. at 25-54, 64). Wolverton claims that he heard screaming in the background of the call. (Id. at 64, 76). Though the call was dispatched as a "code 1", or non-emergency call, Wolverton raced to the scene at a high rate of speed, believing that Castro was in a highly volatile and potentially dangerous situation. (Def. App. 66; Pls.' App. in Supp. Resp. to Def.'s Mot. Summ. J. ["Pl. App."] 23-24, 116). But because Castro's call for assistance was dispatched as a "code 1", Wolverton did not engage his overhead lights or siren. (Def. App. 64). As Wolverton was proceeding toward the recreation center, he traveled through a residential area at speeds approximating 60 miles per hour. (Pl. App. 23-24,166). As he neared a grocery store on Dixon Avenue, Wolverton swerved around a vehicle stopped in the roadway and violently struck L.V. Daniels Jr., who was crossing the street on foot. (Def. App. 18, 20, 64-65).[1] Daniels was flung from the point of impact, suffered severe injuries, and later died.

On December 12, 2005, Daniels's wife and parents filed this lawsuit against Wolverton (in his individual and official capacities) and the City of Dallas for civil rights violations under federal and state law. In their

objections Plaintiffs do not challenge the Magistrate Judge's finding that Plaintiffs abandoned all federal claims against Wolverton save for their substantive due process claim. The Magistrate Judge's recommendation thus focuses on Plaintiffs' complaint that Wolverton's reckless actions deprived Daniels of his right to substantive due process under the Fourteenth Amendment to the United States Constitution and that an unwritten policy of the City of Dallas allowed Wolverton to operate his patrol car in a reckless manner. The Magistrate Judge concluded that Plaintiffs failed to provide sufficient evidence of a substantive due process violation and accordingly granted summary judgment in favor of wolverton on his qualified immunity defense. The Magistrate judge also found that Plaintiffs' claims against wolverton in his official capacity were duplicative of those brought against the City of Dallas. The Magistrate judge determined that there was no basis for municipal liability, however, because Plaintiffs failed to prove an underlying constitutional violation. Finally, the Magistrate judge concluded that Plaintiffs' state-based claims should be dismissed without prejudice under 28 U.S.C. § 1367 (c) (3).

II. Objections

A. Plaintiffs Object That the Magistrate judge Failed to Take the Facts in the Light Most Favorable to Plaintiffs

Plaintiffs first complain that the Magistrate judge adopted Defendants' version of the facts rather than his. It is axiomatic that, on summary judgment, courts are required to construe facts and draw reasonable

inferences in the light most favorable to the non-movant. See Scott v. Harris, 127 S.Ct. 1769, 1774-1775 (2007). The Court is not convinced that the Magistrate judge failed to adhere to these maxims, however. Plaintiffs first claim that the Magistrate judge inappropriately accepted at face value Defendants' evidence that wolverton heard a woman screaming in the background of Officer Castro's call for cover help. wolverton testified that he heard yelling in the background of the call and that he particularly noticed the sound of a woman screaming. (Def. App. 64, 76). Plaintiffs claim that the dispatch tape itself "wholly contradict[s]" Wolverton's characterization of what he heard. (Pls.' Sur-Reply at 3). Having listened to the tape, however, the Court must disagree with Plaintiffs' assessment. Though the background sounds on the tape are somewhat indistinct, loud crowd notices can be heard, dominated by what appears to be a female speaking in excited tones, to say the least. Nothing on the tape essentially discredits Wolverton's testimony that he subjectively believed that the background noises bespoke a volatile situation.

Plaintiffs also challenge the Magistrate judge's reliance on Defendants' evidence that Officer Castro's call for assistance was precipitated by a hostile crowd that had gathered at the recreation center. In their objections Plaintiffs simply assert that they dispute this evidence without specifically referencing any rebuttal evidence of their own. (Objections at 11). Instead Plaintiffs refer back to their sur-reply brief, in which they complain, in conclusory fashion, that Defendants' position is supported by "self-serving" internal officer statements that were made in bad faith and constitute hearsay. (Pls.' Sur-Reply at 3). Plaintiffs offer no evidence to

substantiate their charge that the statements were made in bad faith. Nor have they offered any argument in support of their claim that the statements are hearsay. One of the internal statements relied upon by Defendants is from Castro himself, who simply related his observation that a large and hostile crowd had gathered at the recreation center on the evening of September 23, 2005. (Def. App. 2?). In the absence of any evidence tending to refute Castro's testimony, the Court cannot find that the Magistrate judge erred in relying on it.

Finally, Plaintiffs take issue with Defendants' evidence suggesting that the recreation center was located in a high crime area. Wolverton testified that the recreation center is "a chronic problem area and we receive many calls to that area regarding drugs and weapons." (Id. at 64). Again, although Plaintiffs strenuously dispute that the recreation area is a hotbed of crime, they present no evidence to the contrary. Plaintiffs simply argue that Wolverton's testimony is controverted by the fact that Castro informed the dispatcher that his call for help was a "code 1 ", or non-emergency call. (Pls.' Sur-Reply at 3). This is a non-sequitur. Simply because Castro dispatched a non-emergency request for help does not necessarily mean that the area involved was not crime-ridden.

B. Substantive Due Process

Plaintiffs next object to the Magistrate judge's finding that the Wolverton's conduct did not violate Daniel's substantive due process rights. To make out a substantive due process claim Plaintiffs must show that "the behavior of [Wolverton was] so egregious, so

outrageous, that it may fairly be said to shock the contemporary conscience." County of Sacramento v. Lewis, 523 U.S. 833, 847 n. 8 (1998). In Lewis, the Supreme Court attempted to delineate the level of culpability necessary to set forth a substantive due process violation. It explained that negligent conduct will never shock a court's conscience. Id. at 849. On the other hand, unjustified actions by executive officials that are intended to cause injury are most likely to do so. Id. The difficulty comes when conduct falls in the middle band - "something more than negligence but less than intentional conduct, such as recklessness or gross negligence." Id. (internal quotations omitted). In such a case the court must conduct a searching inquiry into the facts and circumstances of the particular case in light of the right asserted. Breen v. Texas A&M Univ., 485 F.3d 325, 333 (5th Cir. 2007).

Under Lewis, the level of culpability to be applied depends in large measure upon whether executive officials had time to reflect upon their actions. When "unforeseen circumstances demand an officer's instant judgment", such as in Lewis, where an officer was involved in a high speed car chase, consciences will be shocked only if the officer was motivated by an intent to harm. Lewis, 523 U.S. at 853-54. In circumstances where actual deliberation is practical, however, such as in custodial prison situations, an official's mere deliberate indifference may rise to a conscience-shocking level. Id. at 850-51. Courts must look to whether the occasion at hand called for an official to take fast action and make decisions "in haste, under pressure, and [] without the luxury of a second chance." Id. at 853 (internal quotations and citation omitted).

The Magistrate Judge analogized the facts of this case to those involved in Terrell v. Larson, 296 F.3d 975 (8th Cir. 2005), a post-Lewis decision. In Terrell, two deputy sheriffs having dinner at a substation received a "very high priority" call concerning a domestic disturbance within their assigned area. Id. at 977. While en route to the scene, with emergency lights flashing and siren blaring, the deputies drove through a red light and collided with the car of Talena Terrell, killing her. Id. At the time of the impact the officers were traveling around 60-64 miles per hour. Id.

A majority of the Eighth Circuit, sitting en banc, held that the intent to harm standard announced in Lewis should apply to the officers' conduct because "police officers responding to this type of emergency call do not have `the luxury . . . of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations."' Id. at 979 (quoting Lewis, 523 U.S. at 853). The Terrell Court went on to hold that an intent to harm standard would apply even if the situation to which the officers were responding could not objectively be said to be a "true" emergency so long as the officers themselves subjectively "believed they were responding to an emergency call." Id. at 980.[2]

The Terrell Court alternatively concluded that, even if a deliberate indifference standard of fault applied, the plaintiffs' substantive due process claim would still fail because the officers' conduct was not "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Id. at 981 (quoting Lewis, 3 96 F.3 d at 981) . In other words, the Court found that even deliberately indifferent conduct is not "conscience

shocking in the constitutional sense" unless the court finds it to be so. Id. According to the majority of the Eighth Circuit, traffic accidents such as at issue in that case, while "tragic", fail to "shock the modern-day conscience." Id.

Here, the Magistrate Judge recognized that the officers in Terrell were responding to a "very high priority call" while wolverton was responding to a "non-emergency" call. The Magistrate Judge nevertheless determined that this difference was not dispositive because wolverton could have reasonably believed that Officer Castro may have been in danger and in need of immediate assistance. Under Terrell, Wolverton's subjective belief that he was responding to an emergency is alone sufficient for the intent-to-harm standard to apply. Terrell, 396 F.3d at 980. This Court appreciates that Wolverton's predicament placed him somewhere in between the poles recognized by Lewis - calm deliberation surely was not a practical alternative if he was to be of any use, even if the circumstances did not scream "emergency". Whether Wolverton made the right call in perceiving the situation as one necessitating a race to the scene is perhaps open for debate. The point to be made, however, is that wolverton was placed in a situation demanding instant judgment without the ability to calmly and cooly ruminate about the steps he should take. See Tejada v. Knee, 228 F.3d 409 (Table), 2000 WL 1056124, at X2 (5th Cir. July 19, 2000) (concluding that officers' actions were subject to an intent-to-harm standard as opposed to a deliberate indifference standard because the "plaintiffs' allegations indicate [d] that the officers were acting under tense circumstances demanding their

instant judgment, without the opportunity for repeated reflection.").

There is no evidence in the summary judgment record that Wolverton intended to harm Daniels or that he acted maliciously. Even assuming that Wolverton's behavior could be considered negligent or even reckless, it is not so egregious or outrageous that this Court's conscience is shocked by it. See Lewis, 523 U.S. at 847 n. 8. Numerous courts, in circumstances such as these, have found likewise. See Smith v. Walden, 228 F.3d 408 (Table), 2000 WL 1056091, at * 1 (5th Cir. July 17, 2000) (concluding that substantive due process rights were not violated where deputy, responding to a call, drove at least 86 miles per hour on a wet city street without emergency lights on and without a siren, striking and killing fellow motorist)[3]; Rooney v. Watson, 101 F.3d 1378, 1381 (11th Cir. 1996) ("Perhaps [deputy sheriff's] driving at a high rate of speed in a non-emergency or nonpursuit situation reveals gross negligence rather than negligence, but it does not transform a state tort claim into a constitutional deprivation[.]"); Hill v. Shobe, 93 F.3d 418, 421 (7th Cir. 1996) (no constitutional violation where officer - who was speeding, not responding to any police emergency, and failed to engage emergency lights or siren - ran a red light, killing other driver); Leddy v. Township of Lower Merion,114 F.Supp.2d 372, 376 (E.D. Penn. 2000) (officer's conduct found not "constitutionally conscience shocking" where motorist was injured as a result of officer's traveling at an excessive rate of speed in response to a non-emergency call); Gillyard v. Stylios, 1998 WL 966010, at *5-6 (E.D. Pa. Dec. 23, 1998) (officers did not violate Lewis standard even if officers'

response to request for police van was "improvident", where it was neither intentional nor malicious).

C. Claims Against the City of Dallas

Plaintiffs continue to argue that the City of Dallas's inadequate training and policie permitted Wolverton to respond recklessly, and they seek to hold the City liable on that basis. The Magistrate Judge correctly concluded, however, that such claims against a municipality canno survive in the absence of an underlying constitutional violation. See Smith, 2000 WL 1056091, a * 1 (finding that plaintiffs' claims that county failed to adequately train officer or to have a polic governing the use of high speeds was not viable where there was no constitutional injury); Leddy,114 F.Supp.2d at 377 (finding that township could not be held liable because of an inadequate policy o ineffective training program where the actions of the individual officer failed to reach the level of constitutional violation).

III. Conclusion

In sum, after a review of the Magistrate Judge's findings and recommendation on the Defendants' motions for summary judgment and a de novo review of those portions to which Plaintiff filed objections, the Court OVERRULES Plaintiffs' objections in all respects and ADOPTS the findings and recommendation of the Magistrate Judge.

SO ORDERED.
July 18th , 2007

Footnotes

[1] Plaintiffs claim that Wolverton achieved speeds in excess of 60 miles per hour while on Dixon. (Objections at 5). Plaintiffs cite to no evidence substantiating this assertion, however.

[2] The majority left open the question of "whether a different rule should apply if an official's claim of perceived emergency is so preposterous as to reflect bad faith." Id. at 980 n.2.

[3] The facts of Smith are taken from the district court's summary judgment order in Smith et al. v. Walden et al., No. 2:97-CV-204-J (N.D. Tex. filed Oct. 14,1999).

Filed 05/10/2007

CIVIL ACTION NO. 3:05-CV-2460-B

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

SHERONDA DANIELS, ET AL., Plaintiffs,

V.

THE CITY OF DALLAS, ET AL., Defendants.

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Defendants have filed three motions for summary judgment in this civil rights action brought under 42 U.S.C. § 1983 and Texas law. For the reasons stated herein, all three motions should be granted either in part or in their entirety.

1.

On the evening of September 23, 2005, Dallas Police Officer Kent Wolverton was on patrol in his vehicle near Fair Park. (Wolverton's First MSJ App. at 64). At approximately 8:00 p.m., Wolverton heard another police officer on the radio calling for cover at the Larry Johnson Recreation Center, a high-crime area known for drug and weapons activity. (Id. at 64, 66, 80). Wolverton also heard what sounded like a woman screaming in the background. (Id. at 64, 75-76). Because the call was dispatched as a "Code 1," or a non-emergency, Wolverton proceeded to the scene without engaging his emergency lights or siren. (Id. at 71-72, 77). However, Wolverton drove his patrol car at a high rate of speed, traveling through a residential neighborhood at approximately 60 miles per hour. (Id.

at 81, 85-86; see also Plf. App. to Wolverton's First MSJ at 23-24, 116). As he approached a grocery store on Dixon Avenue, Wolverton swerved around a vehicle stopped in the roadway, striking a pedestrian, L.V. Daniels, Jr., who was crossing the street. (Wolverton's First MSJ App. at 18, 20, 64-65). Daniels died as a result of injuries sustained in the collision.

On December 12, 2005, the Daniels family sued Wolverton, in both his official and individual capacity, and the City of Dallas ("the City"), for civil rights violations under federal and Texas law. Although plaintiffs assert a variety of claims under different theories, the gravamen of their complaint is that Wolverton's reckless conduct deprived Daniels of his right to substantive due process under the Fourteenth Amendment to the United States Constitution and that an unwritten City policy allowed Wolverton to operate his patrol car in such a manner.[1] In separate motions, Wolverton seeks summary judgment on his affirmative defense of qualified immunity and on those claims asserted against him in his official capacity. The City also moves for summary judgment as to all claims and causes of action. The issues have been fully briefed by the parties and the motions are ripe for determination.[2]

II.

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322,106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. See Matsushita Electric Industrial Co. v.

Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). A fact is "material" if it might reasonably affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248,106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

A party seeking summary judgment bears the initial burden of showing the absence of a genuine issue for trial. See Duffy v. Leading Edge Products, Inc., 44 F.3d 308, 312 (5th Cir.1995). This may be done by "pointing out'the absence of evidence supporting the nonmoving party's case."' Id., quoting Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 913 (5th Cir.), cent. denied, 113 S.Ct. 98 (1992). Once the movant meets this burden, the nonmovant who has the burden of proof at trial must show that summary judgment is not proper. See Duckett v. City of Cedar Park, 950 F.2d 272, 276 (5th Cir. 1992). The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. See Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir), cent. denied, 113 S.Ct. 82 (1992). All evidence must be viewed in the light most favorable to the party opposing the motion. See Rosado v. Deters, 5 F.3d 119,122 (5th Cir. 1993).

A.

The court initially observes that plaintiffs have sued Wolverton in both his individual and official capacity. Any claims against Wolverton in his official capacity are redundant of those brought against the City of Dallas. See Beall Legacy Partners, L.P. v. City of Waxahachie, No. 305-CV-1942-D, 2006 WL 353471 at *2 (N.D. Tex. Feb. 16, 2006), citing Kentucky v. Graham, 473 U.S.159,166,105 S.Ct. 3099, 3105, 87 L.Ed.2d 114

(1985). In their summary judgment response, plaintiffs acknowledge that "[t]he claim against Officer Wolverton in his capacity as an officer is a personal capacity claim." (Plf. Resp. Br. to Wolverton's Sec. MS1 at 4). Accordingly, the claims against Wolverton in his official capacity should be dismissed.

B.

Plaintiffs allege that Wolverton violated the civil rights and civil liberties of L.V. Daniels, Jr. by operating his patrol car in a reckless manner and with callous disregard for the safety of innocent bystanders. (See Plf. First Am. Compl. at 1-2, Pars. 1-2). Although plaintiffs do not specify the nature of this constitutional violation in their complaint, it is apparent from the summary judgment pleadings that they are attempting to assert a substantive due process claim under the Fourteenth Amendment. Wolverton counters that recklessness and conscious indifference do not give rise to a substantive due process claim in situations where police officers must make quick decisions in responding to calls for assistance. Rather, in order to establish an underlying constitutional violation and overcome the defense of qualified immunity, Wolverton argues that plaintiffs must adduce some evidence that he intended to harm Daniels or that his conduct "shocked the conscience."

1.

Police officers are immune from suit for discretionary acts performed in good faith while acting within the scope of their authority, unless their conduct violates a "clearly established statutory or constitutional right [ ]

of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818,102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The threshold issue in any qualified immunity analysis is "whether plaintiffs allegations, if true, establish a constitutional violation." Hope v. Pelzer, 536 U.S. 730, 736,122 S.Ct. 2508, 2513,153 L.Ed.2d 666 (2002); see also Kinney v. Weaver, 367 F.3d 337, 356 (5th Cir.), cent. denied, 125 S.Ct.102 (2004). Only if the plaintiff sufficiently alleges the violation of a constitutional right does the court decide whether that right was clearly established at the time of the alleged violation and whether the conduct of the police officer was objectively unreasonable under the circumstances. See Siegert v. Gilley, 500 U.S. 226, 231-33,111 S.Ct.1789,1793,114 L.Ed.2d 277 (1991).

2.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall. . . deprive any person of life, liberty, or property, without due process of law." U. S. CONST. amd. XIV, § 1. In addition to guaranteeing procedural fairness, courts have long recognized that the Due Process Clause includes a substantive component that protects individuals against "arbitrary action of government." County of Sacramento v. Lewis, 523 U.S. 833, 845, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998). However, substantive due process is violated "only when [the conduct] 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."' Id., 118 S.Ct. at 1717, quoting Collins v. City of Harker Heights, 503 U.S.115,128,112 S.Ct.1061,1070, 117 L.Ed.2d 261(1992); see also Breen v. Texas A&M University, --- F.3d ---, 2007 WL 1196513 at *4 (5th Cir. Apr. 24, 2007). Liability for negligently inflicted harm is

"categorically beneath the threshold of constitutional due process." Lewis, 118 S.Ct. at 1718. Rather, it is "behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." Id. With respect to conduct that falls somewhere within the "middle range," such as recklessness, the court must conduct a searching inquiry into the facts and circumstances of the particular case in light of the right asserted. Id. at 1717-18.

In Lewis, the Supreme Court held that the legal standard of conduct necessary to establish a Fourteenth Amendment substantive due process violation in a police pursuit case is "shocks the conscience." Id. at 1721. As the Court explained:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." . . . A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within

> stopping range, be they suspects, their passengers, other drivers, or bystanders.
>
> ***
>
> [W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." . . . Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.

Id. at 1720 (internal citations omitted). Since Lewis, courts have applied the "shocks the conscience" or "intent-to-harm" standard in a variety of situations other than high-speed police pursuits. See, e.g. Perez v. Unified Government of Wyandotte Co./Kansas City, 432 F.3d.1163 (10th Cir. 2005), cent. denied, 126 S.Ct. 2971 (2006) (firefighter responding to emergency call sped through intersection and collided with motorist); Terrell v. Larson, 396 F.3d 975 (8th Cir. 2005) (en banc) (police officer responding to reported domestic disturbance drove through red light and collided with motorist); Carter v. Simpson, 328 F.3d 948 (7th Cir. 2003) (deputy sheriff responding to call to investigate reported death collided with motorist); Gillyard v. Stylios, No. 97-6555,1998 WL 966010 (E.D. Pa. Dec. 23,

1998) (two pedestrians struck and killed by police officers speeding through intersection at a high rate of speed after hearing call from another officer requesting a police van); see also Tejada v. Knee, 228 F.3d 409 (Table), 2000 WL 1056124 at *2 (5th Cir. Jul. 19, 2000) (noting that intent-to-harm standard applies when "plaintiffs' allegations indicate that the officers were acting under tense circumstances demanding their instant judgment, without the opportunity for repeated reflection").

3.

The summary judgment evidence shows that Wolverton was on routine patrol when he heard a call for cover on his car radio. (Wolverton's First MSJ App. at 64). The location given by the police officer who made the call was a high-crime area known for drug and weapons activity. (Id. at 64, 66, 80). Wolverton also heard what sounded like a woman screaming in the background. (Id. at 64, 75-76). Although the call was dispatched as a non-emergency, Wolverton sped to the scene, traveling through a residential neighborhood at approximately 60 miles per hour. (Id. at 81, 85-86; see also Plf. App. to Wolverton's First MSJ at 23-24). At no time did Wolverton turn on his emergency lights or siren. (Wolverton's First MSJ App. at 64, 77). As he approached a grocery store on Dixon Avenue, Wolverton swerved to avoid a car stopped in the roadway, striking and killing L.V. Daniels, Jr. who was crossing the street. (Id. at 18, 20, 64-65).

The facts of this case are strikingly similar to those presented in Terrell. There, two deputy sheriffs responding to a domestic disturbance call drove

through a red light at an intersection, colliding with a car driven by Talena Terrell. At the time of the collision, the officers were traveling at speeds in excess of 60 miles per hour. Terrell died as a result of her injuries and her family sued the officers for civil rights violations under 42 U.S.C. § 1983. The district court denied summary judgment for the officers on their qualified immunity defense, holding that Lewis applied only to high-speed police pursuits aimed at apprehending a suspected offender. A divided panel of the Eighth Circuit Court of Appeals affirmed. On en banc reconsideration, a majority of the appeals court reversed, holding that the plaintiffs failed to allege a substantive due process violation under the intent-to-harm standard announced in Lewis:

> [T]he panel majority's decision flies in the face of the Lewis analysis and threatens to deter police officers from deciding to respond to emergency calls, thereby increasing the risk of harm to citizens caught up in these crises. No doubt for this reason, to our knowledge every circuit to consider the issue has applied the Lewis intent-toharm standard to "those myriad situations involving law enforcement and government workers deployed in emergency situations." . . . Similarly, every circuit to consider a high-speed driving situation prior to Lewis concluded that police officers are not subject to substantive due process liability for alleged reckless or grossly negligent driving in response to emergencies other than suspect pursuits[.]
>
> For these reasons, we hold that the intent-to-harm standard of Lewis applies to an officer's

> decision to engage in high-speed driving in response to other types of emergencies, and to the manner in which the police car is then driven in proceeding to the scene of the emergency.

Terrell, 396 F.3d at 979 (internal citations omitted).

The court recognizes that, unlike the officers in Terrell, Wolverton was responding to a "Code I," or a non-emergency call. However, that factual distinction is not dispositive. That the call for cover was dispatched as a non-emergency does not mean that Wolverton had the luxury of cool reflection. Even when viewed in the light most favorable to the plaintiffs, the evidence shows that Wolverton had reason to believe that the other officer may have been in danger and needed immediate assistance. The call came from a high-crime area and Wolverton heard a woman screaming in the background. Those uncontroverted facts suggest that Wolverton was "acting under tense circumstances demanding [his] instant judgment[.]" Tejada, 2000 WL 105124 at *2.

In this case, plaintiffs do not allege, much less adduce any evidence, that Wolverton acted with an intent to harm Daniels or that his conduct in responding to a fellow officer's call for cover somehow "shocked the conscience." To the contrary, plaintiffs advocate a rule that would hold police officers liable for behavior that amounts to recklessness or conscious indifference. This is not the law after Lewis.[3] Because there is no evidence of a substantive due process violation, Wolverton is entitled to summary judgment on his defense of qualified immunity.

C.

The failure to plead and prove an underlying constitutional violation is also fatal to plaintiffs' claims against the City. A municipality may be held liable for the deprivation of rights guaranteed by the Constitution or federal law only if the deprivation was the result of an official policy. See Monell v. Department of Social Services of New York, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). Such a policy may include "a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." Campbell v. City of San Antonio, 43 F.3d 973, 977 (5th Cir. 1995), quoting Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984). However, the official policy or custom must be a "moving force" behind the alleged constitutional violation. See Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir.), cent. denied, 122 S.Ct. 53 (2001).

Even if plaintiffs can prove that the City has an official policy of encouraging police officers to answer non-emergency calls fc assistance in whatever manner they deem necessary, which resulted in Wolverton operating his vehicle at a high rate of speed in a residential neighborhood without engaging his emergency lights and siren, the court has determined that such conduct does not give rise to a substantive due process claim under the Fourteenth Amendment. Without an underlying constitutional violation, there is no basis for municipal liability under section 1983. See Olabisiomotosho v. City of Houston, 185 F.3d 521, 528-

29 (5th Cir. 1999); Breaux v. Brown, No. 04-08, 2006 WL 3760242 at *2 (W.D. La. Nov. 28, 2006).

D.

Plaintiffs also assert a number of claims under the Texas Constitution and state law. A federal court has broad discretion in deciding whether to exercise supplemental jurisdiction over state law claims after all federal claims have been dismissed. 28 U.S.C. § 1367(c)(3); see also Noble v. White, 996 F.2d 797, 799 (5th Cir.1993). Among the factors to be considered in exercising this discretion are judicial economy, convenience, fairness, federalism, and comity. See Rosado v. Wyman, 397 U.S. 397, 403-04, 90 S.Ct. 1207,1213-14, 25 L.Ed.2d 442 (1970). When all federal claims are dismissed prior to trial, these factors weigh heavily in favor of declining to exercise jurisdiction. See Bunch v. Duncan, No. 3-01-CV-0137-G, 2002 WL 324287 at *4 (N.D. Tex. Feb. 27, 2002), quoting Parker & Parsley Petroleum Co. v. Dresser Industries, 972 F.2d 580, 585 (5th Cir.1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendant are dismissed."). Accordingly, plaintiffs' state law claims should be dismissed without prejudice.

RECOMMENDATION

Wolverton's motion for summary judgment on qualified immunity [Doc. #21] and the City's motion for summary judgment [Doc. #61] should be granted in part. Wolverton's motion for partial summary judgment on plaintiffs' official capacity claims [Doc. #39] should be granted in its entirety. All federal claims brought against these defendants should be dismissed with

prejudice. The court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims, and those claims should be dismissed without prejudice.

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party may file written objections to the recommendation within 10 days after being served with a copy. See 28 U.S.C. § 636(b)(1); FED. R. Civ. P. 72(b). The failure to file written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See Douglass v. United Services Automobile Assn, 79 F.3d 1415, 1417 (5th Cir.1996).

DATED: May 10, 2007.

Footnotes

[1] In addition to their substantive due process claim, plaintiffs also sue for: (1) race discrimination and equal protection violations under 42 U.S.C. § 1981; (2) excessive force, cover-up, and intimidation under 42 U.S.C. § 1983; and (3) conspiracy to violate civil rights under 42 U.S.C. § 1985(3). (See PIE First Am. Compl. at 9, Pars. 24-25; at 10, Pars. 26-27; at 11, Par. 28-29). It appears that plaintiffs have abandoned those claims by failing to address them in their summary judgment response. See Thompson v. Exxon Mobil Corp., 344 F.Supp.2d 971, 976 (E.D. Tex. 2004) (citing cases).

[2] As part of their summary judgment response, plaintiffs object to certain evidence submitted by

defendants, including the results of an internal investigation conducted by the Dallas Police Department and an autopsy report which suggests that Daniels may have been intoxicated at the time of the accident. (See PIE Resp. Br. to Wolverton's First MSJ at 20-22; PIE Resp. Br. to City's MSJ at 26-28). The court has not relied on any of this evidence in deciding the summary judgment motions. Accordingly, plaintiffs' objections are overruled as moot. See Continental Casualty Co. v. St. Paul Fire & Marine Ins. Co., No. 3-04-CV-1866-D, 2006 WL 984690 at * 1 n. 6 (N.D. Tex. Apr. 14, 2006).

[3] Plaintiffs cite Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir.1985), cent. denied, 107 S.Ct.1369 (1987), for the proposition that police officers may be liable under 42 U.S.C. § 1983 for acting in a reckless manner or in "conscious disregard of substantial risk of harm to innocent parties[.]" Id. at 167. Grandstaff was decided nearly 15 years before Lewis clarified the legal standard governing a substantive due process claim under the Fourteenth Amendment. Even prior to Lewis, Grandstaff did not enjoy wide application in the Fifth Circuit. See Snyder v. Trepagnier,142 F.3d 791, 797 (5th Cir. 1998), cent. dism'd,119 S.Ct.1493 (1999).

Filed 08/8/2007
CIVIL ACTION NO. 3:05-CV-2460-B
UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

SHERONDA DANIELS, ET AL., Plaintiffs,
V.
THE CITY OF DALLAS, ET AL., Defendants.

AMENDED FINAL JUDGMENT

In accordance with the Court's July 18, 2007 Memorandum Order adopting the findings and recommendation of the United States Magistrate Judge and the Magistrate Judge's May 10, 2007 Findings and Recommendation of the United States Magistrate Judge, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs Sheronda Daniels, individually and on behalf of the estate of L.V. Daniels, Jr., L.V. Daniels, Sr., individually and on behalf of the estate of L.V. Daniels, Jr., and Lille Rue Daniels, individually and on behalf of the estate of L.V. Daniels, Jr., take nothing on their federal claims against Defendants the City of Dallas and City of Dallas Officer Kent Owen Wolverton, individually and in his official capacity, and that such claims be, and they are hereby, DISMISSED with prejudice.

It is further ORDERED, ADJUDGED, and DECREED that this Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims, and that such claims be, and they are hereby, DISMISSED without prejudice under 28 U.S.C. § 1367 (c) (3).

Costs shall be assessed against Plaintiffs in accordance with Rule 54 (d), Federal Rules of Civil Procedure.

SO ORDERED. SIGNED August 8, 2007

Filed: 5/14/2008
No. 07-10883 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHERONDA DANIELS, Individually and on Behalf of the Estate of L V Daniels, Jr Deceased; L V DANIELS, SR, Individually and on Behalf of the Estate of LV Daniels Jr Deceased; LILLIE RUE DANIELS, Individually and on Behalf of the Estate of LV Daniels Jr Deceased,
Plaintiffs -Appellants

v.

CITY OF DALLAS; KENT OWEN WOLVERTON, City of Dallas Officer Individually and in his Official Capacity,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
REHEARING EN BANC

JUDGES: Before HIGGINBOTHAM, STEWART, and OWEN, Circuit Judges.

'The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.